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INTERNATIONAL SEABED AUTHORITY
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TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 2
New York, 12-30 August 1991

RECOMMENDED ANNOTATIONS BY SPECIAL COMMISSION 2 ON THE PROVISIONS OF THE CONVENTION RELATING TO THE STRUCTURE AND ORGANIZATION OF THE ENTERPRISE

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INTRODUCTION

1. The present paper contains the recommendations of Special Commission 2 to the plenary of the Preparatory Commission on the structure and organization of the Enterprise. It incorporates the annotations which were made to working paper 16 (LOS/PCN/SCN.2/WP.16), entitled "Provisions of the Convention relating to the structure and organization of the Enterprise", and recommends supplementary draft provisions to that working paper.

2. Working paper 16 proved to be useful because it is a compendium of all the relevant provisions of the Convention relating to the Enterprise, which are dispersed throughout Part XI and its annexes. It served to identify those provisions of the Convention to which annotations were required to assist the Authority, and subsequently the Enterprise, in making their initial decisions. The working paper also served to identify those elements that would form the substance of recommendations to the Authority on transitional arrangements during the pre-operational stage of the Enterprise. The suggestions of the Chairman to facilitate discussions on transitional arrangements for the Enterprise are contained in documents LOS/PCN/SCN.2/1990/CRP.5 and Addenda 1 and 2.

3. The Special Commission in its meetings on the question of annotations agreed that, while it could not amend the Convention, it could furnish liberal interpretations of its provisions by way of annotations as long as their basic purpose and intent were not disturbed. It was understood that these annotations would serve several purposes: (1) to allow the Preparatory Commission to comment on provisions of the Convention in the interest of promoting reasonable interpretations; (2) to suggest supplementary draft provisions, if necessary, to facilitate its effective application; and (3) to suggest additional draft rules on matters such as confidentiality, on which the Convention has no rule specific to the Enterprise.

4. In general, the Special Commission addressed the need to preserve maximum autonomy for the fully fledged Enterprise and flexibility in its operations, in keeping with its basic commercial character and the need to ensure efficient management and a streamlined structure.

5. There was general agreement that in the relationship between the Governing Board and the Council/Assembly, it would be important to avoid placing unnecessary constraints on the Enterprise. Here, it was also emphasized that the directives given to the Enterprise should be limited to those of a political character, while commercial considerations would be the exclusive concern of the Governing Board of the Enterprise. The Enterprise, it was stressed, would need to be businesslike in its dealings and be protected against pressures from the Authority. In order to avoid interference in the day-to-day operations of the Enterprise by the Governing Board, it was pointed out that the Director-General required independence. It was also noted that it would be important for the mining code to avoid introducing constraints on the Enterprise, e.g., with respect to its procedures for the acquisition of technology.

6. On the basis of the discussions on the various articles in working paper 16, the Special Commission found that annotations were called for with respect to a number of articles. Changes which were made to the articles themselves are underscored in the text that follows.

PROVISIONS OF THE CONVENTION RELATING TO THE STRUCTURE AND ORGANIZATION OF THE ENTERPRISE AND RECOMMENDED ANNOTATIONS THEREON

Article 1

Use of terms

For the purposes of these articles:

(1) "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction;

(2) "Authority" means the International Seabed Authority;

(3) "activities in the Area" means all activities of exploration for, and exploitation of, the resources of the Area;

(4) "Convention" means the United Nations Convention on the Law of the Sea;

(5) "Secretary-General" means the Secretary-General of the Authority;

(6) "debt guarantee" means a promise of a State Party to creditors of the Enterprise to pay, pro rata in accordance with the appropriate scale, the financial obligations of the Enterprise covered by the guarantee following notice by the creditors to the State Party of a default by the Enterprise. Procedures for the payment of those obligations shall be in conformity with the rules, regulations and procedures of the Authority; 1/

(7) "States Parties" has the same meaning as in article 1, paragraph 2, of the Convention;

(8) "Director-General" means the Director-General of the Enterprise.

(9) "Governing Board" means the Governing Board of the Enterprise.

1/ Annex IV, article 11 (3) (h).

Annotation

(1) The Special Commission agreed that the definition of "Governing Board" should be included in the article. Working paper 16 was thus amended to include a new subparagraph 9. The Special Commission decided not to include a definition of the term "nucleus Enterprise", since the definition and functions of the nucleus Enterprise are contained in documents LOS/PCN/SCN.2/1990/CRP.5 and Add.1.

(2) In subparagraph 6 the more general question of how the Enterprise is to be financed was raised in the event that the major contributors (based on the United Nations scale of assessments) do not join. It was noted that the following questions would need to be addressed: whether payment by a State Party of the debt would be treated as a loan to the Enterprise, and if so, whether it was an interest-bearing loan or not; and whether a debt was convertible or not.

Section 1. ESTABLISHMENT OF THE ENTERPRISE

Article 2

Establishment

There is hereby established the Enterprise, the organ through which the Authority shall carry out the functions referred to in article 170, paragraph 1, of the Convention. 2/

Section 2. PURPOSES OF THE ENTERPRISE

Article 3

Purposes of the Enterprise

1. The Enterprise shall be the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2 (a), of the Convention, as well as the transporting, processing and marketing of minerals recovered from the Area. 3/

2/ Article 158 (2).

3/ Article 170 (1).

2. In carrying out its purposes and its functions, the Enterprise shall not interfere in the political affairs of any State Party, nor shall it be influenced in its decisions by the political character of the State Party concerned. 4/

3. Only commercial considerations shall be relevant to its decisions, and these considerations shall be weighed impartially in order to carry out the purposes specified in Annex IV, article 1, of the Convention. 5/

Annotation

(1) This article was described as one which lent itself to flexible interpretation. It was pointed out that paragraph 1 required modification in order to make it more reasonable in the face of current realities and to ensure compatibility with paragraph 3. It was suggested that the Enterprise would initially do less than what had been laid down in the Convention, possibly only monitoring, training, pre-feasibility studies, including studies of operational options. Functions could be assigned to the nucleus Enterprise to be carried out in various stages. It was decided that those questions were best dealt with under a transitional arrangement.

(2) Discussions on paragraph 3 centred on whether the Enterprise should take its decisions only on the basis of "commercial considerations". While some agreed with this, others suggested that profit earning should not be its sole motive, because the Enterprise was there for the common good and it should be a leader in deep seabed mining. It was further suggested that, as a result of the need to preserve the marine environment, the Enterprise should in its decisions take into account any relevant regulatory requirements. While the need to protect and preserve the marine environment enjoyed the full support of the Special Commission, it was pointed out that paragraph 3 was not the place in which to reflect this concern since that paragraph contained the principle on the basis of which the Enterprise was to operate. The need to protect and preserve the marine environment, it was therefore suggested, should be reflected in the provisions regarding the implementation of the functions of the Enterprise.

(3) Some questioned the subdivision of paragraphs 2 and 3 since care had been taken at the time of the Conference not to do so, while others considered it to be a good idea to separate the commercial aspects from the political ones. There was general agreement that decisions relating to political matters should only be made by the Council or the Assembly.

4/ Annex IV, article 12 (7).

5/ Annex IV, article 12 (7).

(4) It was thought that the area of commercial considerations should be left broad. It would be unrealistic to expect the Enterprise to operate only on sound commercial principles in its initial stage, when it would be more concerned with monitoring and research operations. In this connection, it was observed that the meaning of sound commercial principles today included pre-operational work on research and development. This observation was followed by a general discussion on whether the Enterprise should in its initial phase engage in research and development of technology, or whether it should acquire it through transfer of technology. Questions of costs were raised if the Enterprise were to set up its own research and development unit. Some suggested that the Enterprise should concentrate its initial efforts on monitoring the activities of the registered pioneer investors and others engaged in seabed mining. It was recognized that initially the Enterprise would need only a small research and development unit, maybe one or two professional staff, leaving room for expansion later.

(5) It was agreed that the reference in paragraph 3 should not be to paragraph 1 but to Annex IV, article 1, of the Convention because it would otherwise result in an inconsistency with the Convention's direction on the matter.

Section 3. LEGAL PERSONALITY

Article 4

Legal personality

1. The Enterprise shall, within the framework of the international legal personality of the Authority, have such legal capacity as is necessary for the exercise of its functions and the fulfilment of its purposes as is provided for in the Statute set forth in Annex IV and, in particular, the capacity: 6/

(a) to enter into contracts, joint arrangements or other arrangements, including agreements with States and international organizations;

(b) to acquire, lease, hold and dispose of immovable and movable property;

(c) to be a party to legal proceedings; 7/

(d) to loan money, issue guarantees and use its credit;

6/ Article 170 (2); Annex IV, article 13 (2).

7/ Annex IV, article 13.

(e) to acquire, hold, use and dispose of shares or other interests in, or obligations of, corporations, associations, partnerships, trusts or other enterprises, or any obligations of a Government;

(f) to pay pension and establish pension plans, profit sharing and other incentive plans for its staff;

(g) to indemnify the members of the Governing Board, the Director-General, officials and staff; and

(h) to exercise such powers incidental to its business as shall be necessary. 8/

2. The Enterprise shall act in accordance with the Convention and the rules, regulations and procedures of the Authority, as well as the general policies established by the Assembly, and shall be subject to the directives and control of the Council. 9/

3. Subject to paragraph 2, the Enterprise shall enjoy autonomy in the conduct of its operations. 10/

Annotation

(1) The opinion was expressed that the functions outlined in paragraph 1 (d) and (e) should not be under the purview of the Enterprise, but should be left to the Council or Assembly. Given current realities, it was pointed out that there was no reason for the Enterprise to undertake these functions since they would not be required in the foreseeable future at any rate. It was proposed that the Enterprise should give the proceeds from its operations to those that needed it and not reinvest it; reinvestments, it was suggested, might result in benefits being denied to a larger community. On the other hand, it was stated that most businesses needed the freedom to carry out the functions contained in paragraph 1 (d) and (e) and that they constituted general practice. It was pointed out that the Enterprise should not be strait-jacketed by provisions which prevented it from playing the market and maximizing its profits. Functions like these would also ensure the Enterprise's autonomy.

8/ Annex IV, article 12 (6).

9/ Article 170 (2).

10/ Annex IV, article 2 (2).

(2) Clarification was sought as to what is meant by "or any obligations of a Government" in paragraph 1 (e). It was noted that the guiding part of subparagraph (e) was its first line, i.e., "to acquire, hold, use and dispose of shares or other interests in," the implication being that the Enterprise can also deal with Governments. In that connection it was noted that this should not be a function of the Governing Board. The suggestion was made that a term other than "obligations" might be more suitable.

Section 4. PLACE OF BUSINESS

Article 5

Place of business

1. The Enterprise shall have its principal office at the seat of the Authority. 11/

2. The Governing Board may establish in the territory of any State Party with the consent of that State Party other offices and facilities as it deems necessary for the exercise of the functions of the Enterprise. 12/

Section 5. STRUCTURE OF THE ENTERPRISE

Article 6

Structure

The Enterprise shall have a Governing Board, a Director-General and the staff necessary for the exercise of its functions. 13/

Annotation

Attention was given to the relationship between the Director-General and his staff, with emphasis on the need for the Director-General to have full control over day-to-day operations. It was agreed that the power to appoint and dismiss staff must be at his discretion.

11/ Annex IV, article 8.

12/ Annex IV, article 8.

13/ Annex IV, article 4.

Section 6. THE GOVERNING BOARD

Article 7

Convening of first meeting

The first meeting of the Governing Board shall be convened by the Secretary-General within [...] following the date on which the Convention enters into force.

Article 8

Frequency of meetings

The Governing Board shall meet as often as the business of the Enterprise may require. 14/

Article 9

Place of meeting

The Governing Board shall normally function at the principal office of the Enterprise. 15/

Article 10

Membership

1. The Governing Board shall be composed of 15 members elected in accordance with article 24, subparagraph (b). 16/

2. Members of the Board shall act in their personal capacity. In the performance of their duties they shall not seek or receive instructions from any Government or from any other source. 17/

14/ Annex IV, article 5 (6).

15/ Annex IV, article 5 (6).

16/ Annex IV, article 5 (1).

17/ Annex IV, article 5 (4).

Annotation

It was pointed out that a time-frame would need to be set for the first election of the members of the Governing Board. In this connection, it was noted that it would be up to the Authority to decide when that election should take place.

Article 11

Equitable geographical distribution and the representation of special interests

In the election of members of the Governing Board, due account shall be taken of the need for equitable geographical distribution and the representation of special interests. 18/

Annotation

Some favoured the deletion of the reference to "special interests" in the article while reserving their position on the question of the representation of land-locked and geographically disadvantaged States. It was noted that while the Secretariat had made a reasonable analogy to the election of other bodies of the Authority, namely the Commissions, the reference to "special interests" should, none the less, be deleted in the absence of a direct guideline in the Convention. It was also noted that there was no definition of "special interests" in the Convention and that article 5 (1) of Annex IV only referred to the principle of equitable geographical distribution. Furthermore, it was argued that since the members of the Governing Board should act in their personal capacity there was no need for the criteria of special interests. It was therefore proposed that the reference in footnote 18 be changed to article 5 (1) of Annex IV instead of article 163 (4). Others opposed the deletion of the reference to "special interests" and a consequent change in footnote 18. Another member considered it important to retain the reference in view of the position of land-locked and geographically disadvantaged States.

Article 12

Nominations

In submitting nominations of candidates for election to the Governing Board, members of the Authority shall bear in mind the need to nominate candidates of the highest standard of competence, with qualifications in

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18/ Based upon article 163 (4).

relevant fields, so as to ensure the viability and success of the Enterprise. 19/

Annotation

It was pointed out that the reference to "relevant fields" would require elaboration. In this connection it was observed that candidates should have technical and relevant practical experience. It was suggested that this should be made explicit in the article. It was noted that guidance as to some of the types of expertise required might be inferred from the table in document LOS/PCN/BUR/R.6, i.e., the report of the Group of Technical Experts to the General Committee, in which are outlined the priority disciplines which training should address. It was emphasized that a combination of expertise should be represented on the Governing Board, for example, financial accounting and administrative and project management.

Article 13

Term of office

1. Members of the Governing Board shall be elected for four years and may be re-elected; and due regard shall be paid to the principle of rotation of membership. 20/

2. Members of the Board shall continue in office until their successors are elected. 21/

3. If the office of a member of the Board becomes vacant, the Assembly shall, in accordance with article 24, subparagraph (b), elect a new member for the remainder of his predecessor's term. 22/

Annotation

(1) With respect to paragraph 1, it was proposed that, a method should be found to rotate the membership of the Governing Board in such a way as to ensure continuity.

19/ Annex IV, article 5 (1).

20/ Annex IV, article 5 (2).

21/ Annex IV, article 5 (3).

22/ Annex IV, article 5 (3).

(2) Following the discussions on articles 16, 17 and 18, and specifically the need to deal with the problem of repeated absenteeism without good reason, it was suggested that an annotation could be made under paragraph 3 to the effect that a member who was absent without good cause for three, four or five statutory meetings of the Board would be disqualified.

Article 14

Remuneration

Each member of the Governing Board shall receive remuneration to be paid out of the funds of the Enterprise. The amount of remuneration shall be fixed by the Assembly, upon the recommendation of the Council. 23/

Article 15

Powers and functions of the Governing Board

1. The Governing Board shall direct the operations of the Enterprise. Subject to the Convention, the Board shall exercise the powers necessary to fulfil the purposes of the Enterprise, including powers: 24/

(a) to elect a Chairman from among its members;

(b) to adopt its rules of procedure;

(c) to draw up and submit formal written plans of work to the Council in accordance with article 153, paragraph 3, and article 162, paragraph 2 (j), of the Convention;

(d) to develop plans of work and programmes for carrying out the activities specified in article 170 of the Convention;

(e) to prepare and submit to the Council applications for production authorizations in accordance with article 151, paragraphs 2 to 7, of the Convention;

(f) to authorize negotiations concerning the acquisition of technology, including those provided for in Annex III, article 5, paragraph 3 (a), (c) and (d), of the Convention, and to approve the results of those negotiations;

23/ Annex IV, article 5 (5).

24/ Annex IV, article 6.

(g) to establish terms and conditions, and to authorize negotiations, concerning joint ventures and other forms of joint arrangements referred to in Annex III, articles 9 and 11, of the Convention, and to approve the results of such negotiations;

(h) to recommend to the Assembly what portion of the net income of the Enterprise should be retained as its reserves in accordance with article 160, paragraph 2 (f), and Annex IV, article 10, of the Convention;

(i) to approve the annual budget of the Enterprise;

(j) to authorize the procurement of goods and services in accordance with Annex IV, article 12, paragraph 3, of the Convention;

(k) to submit an annual report to the Council in accordance with Annex IV, article 9, of the Convention;

(l) to submit to the Council for the approval of the Assembly draft rules in respect of the organization, management, appointment and dismissal of the staff of the Enterprise and to adopt regulations to give effect to such rules;

(m) to borrow funds and to furnish such collateral or other security as it may determine in accordance with Annex IV, article 11, paragraph 2, of the Convention;

(n) to enter into any legal proceedings, agreements and transactions and to take any other actions in accordance with Annex IV, article 13, of the Convention;

(o) to delegate, subject to the approval of the Council, any non-discretionary powers to the Director-General and to its committees;

(p) to nominate the Director-General for recommendation by the Council and election by the Assembly; 25/

(q) to recommend to the Council the ceiling on the Enterprise's borrowings; 26/

25/ Annex IV, article 7 (1).

26/ Annex IV, article 11 (2) (a).

(r) to prepare, at the earliest practicable date after the Convention enters into force, and thereafter at annual or other appropriate intervals, a schedule of the magnitude and timing of its requirements for the funding of its administrative expenses and for activities carried out by the Enterprise in accordance with article 170 and Annex IV, article 12, of the Convention; 27/

(s) to prepare a funding schedule for the repayment of the interest-free loans to the Enterprise from States Parties to be adopted by the Assembly on the recommendation of the Council. 28/

2. In addition, the Governing Board shall:

(a) establish procurement rules, regulations and procedures in accordance with article 43; 29/

(b) establish reporting requirements and procedures pursuant to Annex IV, article 9, of the Convention;

(c) set out procedures for funding pursuant to Annex IV, article 11, of the Convention;

(d) provide procedures for the approval of the annual budget pursuant to article 15, paragraph 1 (i);

(e) establish accounting and internal audit procedures.

Annotation

(1) The general question was raised as to whether there was any point in electing the Governing Board upon the establishment of the Enterprise if the current economic conditions persisted, since it would end up being a burden on the budget of the Authority. The opinion was expressed that it was necessary to elect a Governing Board upon the establishment of the Enterprise, in order for it to determine policy decisions which the Enterprise would implement, but that the frequency of the Board's meetings in the initial stages could be significantly reduced.

(2) It was noted that article 15, listing 20 functions of the Governing Board, was difficult to relate to the need for flexible management and a dynamic Director-General.

27/ Annex IV, article 11 (3) (d) (ii).

28/ Annex IV, article 11 (3) (f).

29/ Annex IV, article 12 (3).

(3) With respect to paragraph 1 (b), the question was raised as to whether it was up to Special Commission 2 to prepare rules of procedure for the Governing Board. It was pointed out that the Board has been given the authority to determine its own rules of procedure and that Special Commission 2 was not to make binding rules for the Board but only recommendations in its annotations. It was suggested that the Governing Board should include in its rules of procedure some rules regarding the length of the term of office of the Chairman, the question of the rotation of the Chairman and the members of the Governing Board as well as the question of equitable geographical distribution on the Board.

(4) Following the discussions on articles 16, 17 and 18, it was suggested that the Governing Board should in its rules of procedure take into account the possibility of consultations on non-substantive matters being undertaken by the Chairman and some of the members of the Board outside the framework of a meeting of the Board. This procedure would, for example, apply to budgetary matters which did not involve any additional expenses. The Chairman could communicate with the members by mail and obtain their views on such matters.

(5) Since the Convention was silent on the subject of vice-chairmen, it was also pointed out that it was usual practice to provide for one or two vice-chairmen in the event that the Chairman was unable to attend meetings of the Board.

(6) There was extensive discussion on paragraph 2 (e) and the question of whether the Governing Board should establish its own internal audit and accounting procedures or whether this should be left to the Authority. While it was considered necessary to allow the Board the freedom to decide on the internal audit procedures which should be followed since the internal audit was essentially there for the benefit of the Director-General - it is his internal check system or early watchdog unit - no agreement could be reached on the question of whether the Governing Board should establish its own accounting procedures.

(7) While it was agreed that it was the Council which would draw up accounting rules, it was pointed out that there was no provision in the Convention which specifically authorized the Council to establish accounting procedures. The view was expressed that approval should be given by the Council for the Governing Board to establish accounting procedures for the Enterprise and that this should be listed as a function of the Council under article 25. Since the Enterprise would also be engaged in commercial operations, it was suggested that its accounting rules and procedures should closely follow those developed for contractors. It was pointed out that the decision on accounting procedures for the Enterprise should await the results of the ongoing discussions on the subject in relation to the contractor in Special Commission 3, since at its conclusion a set of accounting rules and procedures were to be appended to the contract. It was further noted that if Special Commission 3 accepted the accounting principles and procedures contained in document LOS/PCN/SCN.3/WP.6/Add.7 they would be part of the

generally recognized accounting principles in accordance with which the Enterprise was to establish its accounting procedures. Another view was that the Enterprise had the autonomy to establish its own accounting procedures without obtaining approval from the Council. Reference was also made to article 30 where provision was made for an annual audit by an independent auditor appointed by the Council. A proposal was made to subdivide subparagraph (e) into new subparagraphs (e) and (f) as follows:

"(e) to establish accounting procedures in accordance with generally recognized accounting principles;

"(f) to establish internal audit procedures."

(8) It was pointed out that most companies' accounting procedures were based on accounting principles in use and that the accounting procedures conformed to a general format. The phrase "in accordance with generally recognized accounting principles" is a standard phrase which applies to a large number of countries in the world and has a standing in the professional community of accountants.

Article 16

Quorum for meetings

Two thirds of the members of the Governing Board shall constitute a quorum. 30/

Article 17

Voting rights

Each member of the Governing Board shall have one vote. 31/

Article 18

Decision-making

1. All matters before the Governing Board shall be decided by a majority of its members. If a member has a conflict of interest on a matter before the Board he shall refrain from voting on that matter. 32/

30/ Annex IV, article 5 (7).

31/ Annex IV, article 5 (8).

32/ Annex IV, article 5 (8).

2. Without prejudice to the provisions in paragraph 1 of this article, in so far as possible, the Governing Board should make every effort to reach its decisions on substantive matters on the basis of general agreement.

3. [Deleted]

Annotation to articles 16, 17 and 18

(1) There was extensive discussion on the possibility of delaying decisions if only two thirds of the members of the Governing Board were able to attend a meeting of the Board and a decision had to be taken by a majority. Two suggestions were made to deal with the problem: first, that proxy voting should be permitted; and second, that the Governing Board could provide in its rules of procedure that where a decision had to be taken by a quorum the decision of a member who could not be present had to be confirmed by a postal ballot. It was observed that proxy voting was only possible if there was a quorum. In this connection it was pointed out that it was the responsibility of the Chairman to ensure that the members of the Board were able to attend a meeting. It was recognized that once a quorum was established and a decision needed to be taken by a majority, proxy voting should be permitted where it was not possible to get a majority. Advanced information on matters which would be discussed at the meeting would have to be sent to the members of the Governing Board so that the members voting by proxy would have all the necessary information. The Special Commission understood the term "majority" in paragraph 1 of article 18 to mean a majority of the members of the Governing Board.

(2) It was stressed that the problem of repeated absenteeism of members of the Governing Board, without good reason, would require some disciplinary measures. It was suggested that an annotation could be made to this effect under article 13 (3).

(3) With respect to the issue of conflict of interest in the second sentence of paragraph 1 of article 18, it was recognized that where a member had or acquired in the future an interest in the matter being voted on, a legal obligation to refrain from voting, rather than a provision which appealed to his morality, was called for. It was suggested that the Governing Board should in cases of doubt determine by a majority whether or not there was in fact a conflict of interest.

(4) It was observed that since paragraph 2 of article 18 did not derive from the Convention, the provision should be hortatory and not obligatory in respect of arriving at decisions on the basis of consensus or general agreement. It was decided to delete paragraph 3 which contained the definition of "consensus". The Special Commission agreed to reword paragraph 2 as follows: "Without prejudice to the provisions in paragraph 1 of this article, in so far as possible, the Governing Board should make every effort to reach its decisions on substantive matters on the basis of general agreement."

Section 7. THE DIRECTOR-GENERAL AND THE STAFF OF THE ENTERPRISE

Article 19

The Director-General

1. The Director-General shall be elected in accordance with article 24, subparagraph (b).

2. The Director-General shall not be a member of the Governing Board.

3. The Director-General shall hold office for a fixed term, not exceeding five years, and may be re-elected for further terms. 33/

Article 20

Functions and duties of the Director-General

1. The Director-General shall act as the legal representative and chief executive of the Enterprise and shall be directly responsible to the Governing Board for the conduct of the operations of the Enterprise.

2. The Director-General shall be responsible for the organization, management, appointment and dismissal of the staff of the Enterprise in accordance with the rules and regulations referred to in article 15, paragraph 1 (1).

3. The Director-General shall participate, without the right to vote, in the meetings of the Governing Board and may participate, without the right to vote, in the meetings of the Assembly and the Council when these organs are dealing with matters concerning the Enterprise. 34/

Article 21

The staff of the Enterprise

1. The staff of the Enterprise shall be appointed by the Director-General. The terms and conditions on which they shall be appointed, remunerated and dismissed shall be in accordance with the rules and regulations referred to in article 15, paragraph 1 (1). 35/

33/ Annex IV, article 7 (1).

34/ Annex IV, article 7 (2).

35/ Based upon article 167 (3).

2. The staff of the Enterprise shall consist of such qualified scientific and technical and other personnel as may be required to fulfil the administrative functions of the Enterprise. 36/

3. The paramount consideration in the recruitment and employment of the staff and in the determination of their conditions of service shall be the necessity of securing the highest standards of efficiency and of technical competence. Subject to this consideration, due regard shall be paid to the importance of recruiting the staff on an equitable geographical basis. 37/

4. The responsibilities set forth in article 168, paragraph 2, of the Convention are equally applicable to the staff of the Enterprise. 38/

Article 22

International character of the Director-General and the staff

In the performance of their duties the Director-General and the staff shall not seek or receive instructions from any Government or from any other source external to the Enterprise. They shall refrain from any action which might reflect on their position as international officials of the Enterprise responsible only to the Enterprise. Each State Party undertakes to respect the exclusively international character of the responsibilities of the Director-General and the staff and not to seek to influence them in the discharge of their responsibilities. 39/

Section 8. CONFIDENTIALITY

Article 23

Confidentiality

1. The members of the Governing Board and the Director-General and the staff of the Enterprise shall not disclose, even after the termination of their functions as such, any confidential information coming to their knowledge by reason of their duties on or in relation to the Enterprise.

36/ Based upon article 167 (1).

37/ Annex IV, article 7 (3).

38/ Annex IV, article 7 (5).

39/ Annex IV, article 7 (4).

2. The duty of the members of the Governing Board and the Director-General and the staff of the Enterprise not to disclose confidential information constitutes both an obligation in respect of the individual's appointment or employment for the purposes of the Enterprise and a personal responsibility entailing financial liability. In addition to being liable to any financial or other sanction, any person who has disclosed confidential information in breach of his duty in that behalf shall cease to exercise any function in relation to the receipt or custody of confidential information and shall be disqualified from being re-elected or reappointed to exercise any such function. 40/

Annotation

(1) It was agreed that the rule suggested by the Secretariat (based on rule 16 in LOS/PCN/WP.24 of September 1984) would require redrafting and expansion and that it would also need to apply in the transitional period. It was thought that the drafting of a rule on confidentiality should not be left to the Enterprise as it might draft it to suit its own purposes.

(2) There was agreement that the rule should establish the basic principle, applicable to the Enterprise as a whole. It was suggested that this principle could incorporate the wording of article 168 (2) of the Convention. With respect to the mechanism for observance of this principle, it was pointed out that article 14 (3) of Annex III provided a juridical basis for confidentiality.

(3) It was proposed that provision should be made for the signing of a confidentiality clause or agreement at the time of employment. All that was needed was a signature which attested that a person had accepted the confidentiality clause and a provision providing for a penalty in case of breach. Whether there should be an oath or detailed staff rules would need to be worked out. It was pointed out that where there were no provisions for sanctions in municipal law, workers were often required to take an oath, e.g., under the Official Secrets Act.

(4) It was agreed that the obligation not to disclose confidential information should also cover the post-employment period. These sanctions should be different, of a financial or penal nature depending on the extent of the breach caused. However, it was agreed that a former employee should not be held liable in perpetuity.

40/ LOS/PCN/WP.24, rule 16.

(5) It was furthermore agreed that a differentiation should be made between management and staff. It was pointed out that it would be necessary to separate the responsibility of the management of the Governing Board from that of the Director-General. A uniform principle should, however, be applicable in both cases, but the terms might need to be different. It was proposed that a distinction should be made between staff with access to confidential information in the course of their normal duties and those without such access.

(6) It was proposed that in paragraph 1 the term "staff of the Enterprise" needed to be defined so as to make it clear that the provision applied to all staff, whether permanent, short-term, temporary staff or consultants. It was suggested that in the case of independent contractors an agreement could be drawn up with the Enterprise which would exempt the Enterprise from any liability for their acts.

(7) It was proposed that paragraph 2 should state that the Enterprise and its officers and staff were jointly and severally liable for any damages for breach of the obligations set forth in paragraph 1.

(8) It was pointed out that as the requirement of confidentiality was provided for in the Convention in the Authority itself, each of the executive bodies, i.e., the Council and Governing Board, had the responsibility not only to disclose confidential information but also to provide the mechanism to prevent this from happening.

(9) The question was raised as to which organ had the competence to establish financial liabilities and their extent. It was pointed out that the Director-General would be responsible for sanctions with respect to the staff. The Governing Board would be responsible for sanctions with respect to the Director-General and the Authority would be responsible with respect to the Governing Board. It was noted that it would be necessary to provide for a graduation of sanctions as breaches took place at different levels and might vary in magnitude.

(10) The question was raised as to the power of the Governing Board to impose sanctions for breach of confidentiality in relation to the post-employment period. It was pointed out that a former member could not be made a prisoner of his conscience and thus be stopped from earning a living. An analogy was drawn to the situation in municipal law where contracts in restraint of trade were intended to prevent the exploitation of trade secrets learned by the employee in the course of his employment.

(11) Several problems were highlighted in connection with the implementation of an enforcement mechanism, particularly if a breach occured after termination of employment, in which case national legislation would then be applicable. It was pointed out that some national systems had no sanctions and that there might be a problem in asking Governments to provide for such sanctions in their national laws. It was also pointed out that there might be a problem with implementing financial liability for breach of personal

responsibility in case of bankruptcy. In this connection, it was suggested that the Enterprise could set up a fund akin to that which existed in national systems where insurance institutions provided coverage. While it was thought that there was no problem in setting up a fund for the staff, it was considered difficult to do the same for the members of the Governing Board as it would be hard to assess their collective and individual responsibility. It was pointed out that an insurance policy for staff would not be a real sanction and that it might be preferable to have a fidelity bond - financed through a deduction from the employees' salary - which would be forfeited once a staff member was found guilty of disclosing confidential information. Another option would be to dismiss the person concerned. It was thought that the Director-General, since he was in an intermediary position but in some respects also a civil servant, would in case of breach be directly responsible, by virtue of his function or title alone. It was considered that the rule with respect to the Director-General, as manager, should be as rigid as that for the staff.

(12) It was agreed that not only the violator but also the beneficiary of a violation should be punished through financial, penal or quasi-disciplinary administrative sanctions. If the recipient of the confidential information was a contractor or subcontractor, the party concerned could be disqualified. If he was an outsider or third company which had found out what the other competitors had bid in order to secure the award of a contract, then appropriate sanctions could be disqualification or blacklisting for the future. He would thus be debarred from conducting business with the Enterprise in the future.

Section 9. RELATIONSHIP OF THE ENTERPRISE TO THE ASSEMBLY AND TO THE COUNCIL OF THE AUTHORITY

Article 24

The Assembly

The Assembly shall:

(a) establish general policies for the Enterprise pursuant to article 170, paragraph 2, and Annex IV, article 2, paragraph 1, of the Convention;

(b) elect, upon the recommendation of the Council, the members of the Governing Board and the Director-General; 41/

(c) fix, upon the recommendation of the Council, the remuneration of the members of the Governing Board; 42/

41/ Article 160 (2) (c).

42/ Annex IV, article 5 (5).

(d) determine, upon the recommendation of the Governing Board, what portion of the net income of the Enterprise shall be retained as reserves of the Enterprise; 43/

(e) consider and approve, upon the recommendation of the Governing Board of the Enterprise, the rules, regulations and procedures relating to the transfer of funds from the Enterprise to the Authority; 44/

(f) adopt, upon the recommendation of the Council and the advice of the Governing Board, the schedule to repay interest-free loans from States Parties to the Enterprise; 45/

(g) approve draft rules submitted by the Council in respect of the organization, management, appointment and dismissal of staff in accordance with article 15, paragraph 1 (1). 46/

Article 25

The Council

The Council shall:

(a) issue directives to the Enterprise in accordance with article 170 and annex IV, article 2, of the Convention; 47/

(b) recommend to the Assembly candidates for the election of the members of the Governing Board and the Director-General; 48/

(c) recommend to the Assembly the remuneration of the members of the Governing Board; 49/

43/ Annex IV, article 10 (2).

44/ Article 160 (2) (f) (ii).

45/ Annex IV, article 11 (3) (f).

46/ Annex IV, article 6 (1).

47/ Article 162 (2) (i).

48/ Article 162 (2) (c).

49/ Annex IV, article 5 (5).

(d) approve, upon the recommendation of the Governing Board, the ceiling on borrowings of the Enterprise; 50/

(e) appoint the independent auditor referred to in article 30;

(f) approve the delegation by the Governing Board of any non-discretionary powers to the Director-General and to its committees; 51/

(g) approve plans of work submitted by the Governing Board in accordance with Annex IV, article 12, of the Convention, applying, mutatis mutandis, the procedures set forth in article 162, paragraph 2 (j), of the Convention; 52/

(h) approve applications submitted by the Governing Board for production authorizations; 53/

(i) receive the annual report of the Governing Board; 54/

(j) consider the reports of the Enterprise and transmit them to the Assembly with its recommendations; 55/

(k) receive from the Governing Board and submit to the Assembly for approval draft rules in respect of the organization, management, appointment and dismissal of staff; 56/

(l) consider and take a decision on the annual reports containing an audited statement of accounts and receive at appropriate intervals a summary statement of the financial position of the Enterprise and a profit and loss statement showing the results of its operations; 57/

50/ Annex IV, article 11 (2) (a).

51/ Annex IV, article 6 (o).

52/ Article 162 (2) (k).

53/ Annex IV, article 6 (e).

54/ Annex IV, article 6 (k).

55/ Article 162 (2) (g).

56/ Annex IV, article 6 (l).

57/ Annex IV, article 9 (1).

(m) recommend to the Assembly a schedule for the repayment of interest-free loans to the Enterprise from States Parties on the advice of the Governing Board; 58/

(n) approve guidelines with regard to the preferences to be accorded to goods and services originating in developing States, including the land-locked and the geographically disavantaged among them. 59/

Annotation

(1) It was pointed out that the provision in subparagraph (a) permitted the Council to issue directives with respect to the day-to-day running of the Enterprise - the responsibility of the Director-General - and that it was thus more appropriate to define the powers of the Council in more detail and to clarify the subjects on which directives could be issued and how far they should go.

(2) It was agreed that subparagraph (a) should be interpreted in the context of article 4 (3) of the present paper. This would clarify that the directives only refer to those which the Council would be giving to the Governing Board on policy matters. Since article 4 (3) had been taken from article 2 (2) of Annex IV of the Convention, it was agreed to include a reference in subparagraph (a) to article 2 of Annex IV so that the paragraph would now read as follows: "issue directives to the Enterprise in accordance with article 170 and Annex IV, article 2, of the Convention".

(3) It was agreed to add the words "and take a decision on" after the word "consider" in the first line of subparagraph (1).

Section 10. FINANCES

Article 26

Sources of funds

The funds of the Enterprise shall include:

(a) amounts received from the Authority in accordance with article 173, paragraph 2 (b), of the Convention;

(b) voluntary contributions made by States Parties for the purpose of financing the activities of the Enterprise;

58/ Annex IV, article 11 (3) (f).

59/ Annex IV, article 12 (3) (b) (ii).

(c) funds borrowed by the Enterprise;

(d) income of the Enterprise from its operations;

(e) other funds made available to the Enterprise to enable it to commence operations as soon as possible and to carry out its functions. 60/

Article 27

Borrowing power of the Enterprise

1. The Enterprise shall have the power to borrow funds and to furnish such collateral or other security as it may determine. Before making a public sale of its obligations in the financial markets or currency of a State Party, the Enterprise shall obtain the approval of that State Party. The total amount of borrowings shall be approved by the Council upon the recommendation of the Governing Board.

2. States Parties shall make every reasonable effort to support applications by the Enterprise for loans on capital markets and from international financial institutions. 61/

Article 28

Financing of the first mine site and initial administrative expenses

1. The Enterprise shall be provided with the funds necessary to explore and exploit one mine site and to transport, process and market the minerals recovered therefrom and the nickel, copper, cobalt and manganese obtained, and to meet its initial administrative expenses. 62/

2. All States Parties shall make available to the Enterprise an amount equivalent to one half of the funds referred to in paragraph 1 by the way of long-term interest-free loans in accordance with the scale of assessments for the United Nations regular budget in force at the time when the assessments

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60/ Annex IV, article 11 (1) (e).

61/ Annex IV, article 11 (2).

62/ The Preparatory Commission should note that the amount of the said funds, and the criteria and factors for its adjustment, shall be included in the draft rules, regulations and procedures of the Authority.

were made, adjusted to take into account the States which are not members of the United Nations. Debt incurred by the Enterprise in raising the other half of the funds shall be guaranteed by all States Parties in accordance with the same scale.

3. If the sum of the financial contributions of States Parties is less than the funds to be provided to the Enterprise under paragraph 1, the Assembly shall, at its first session, consider the extent of the shortfall and adopt by consensus measures for dealing with this shortfall, taking into account the obligations of States Parties under paragraphs 1 and 2, and any recommendations of the Preparatory Commission.

4. (a) Each State Party shall, within 60 days after the entry into force of the Convention, or within 30 days after the deposit of its instruments of ratification or accession, whichever is later, deposit with the Enterprise irrevocable, non-negotiable, non-interest-bearing promissory notes in the amount of the share of such State Party of interest-free loans pursuant to paragraph 2.

(b) The Governing Board shall prepare, at the earliest practicable date after the Convention enters into force, and thereafter at annual or other appropriate intervals, a schedule of the magnitude and timing of its requirements for the funding of its administrative expenses and for the activities carried out by the Enterprise in accordance with article 170 and Annex IV, article 12, of the Convention.

(c) The States Parties shall thereupon be notified by the Enterprise, through the Authority, of their respective shares in accordance with paragraph 2, required for such expenses. The Enterprise shall encash such amounts of the promissory notes as may be required to meet the expenditure referred to in the schedule with respect to interest-free loans.

(d) States Parties shall, upon receipt of the notification, make available their respective shares of debt guarantees for the Enterprise in accordance with paragraph 2.

5. (a) If the Enterprise so requests, States Parties may provide debt guarantees in addition to those provided in accordance with the scale referred to in paragraph 2.

(b) In lieu of debt guarantees, a State Party may make a voluntary contribution to the Enterprise in an amount equivalent to that portion of the debts which it would otherwise be liable to guarantee.

6. Repayment of the interest-bearing loans shall have priority over the repayment of the interest-free loans. Repayment of interest-free loans shall be in accordance with a schedule adopted by the Assembly, upon the recommendation of the Council and the advice of the Governing Board. In the

exercise of this function the Board shall be guided by the relevant provisions of the rules, regulations and procedures of the Authority, which shall take into account the paramount importance of ensuring the effective functioning of the Enterprise and, in particular, ensuring its financial independence. 63/

7. Funds made available to the Enterprise shall be in freely usable currencies or currencies which are freely available and effectively usable in the major foreign exchange markets. Except as provided in article 27, no State Party shall maintain or impose restrictions on the holding, use or exchange by the Enterprise of these funds. 64/

Annotation

(1) With respect to paragraph 1, it was pointed out that, in view of the considerable uncertainties surrounding seabed mining, including the size and financial requirements for the initial mine site, it would be difficult to predict with any accuracy the amount of funds that would be required.

(2) It was generally felt that Governments should not be required to make their investments until the operational plan had been drawn up. However, since the Enterprise would need funds to cover its initial administrative expenses, this component of the funds should be budgeted separately. The rest of the funds would be subject to a call-up by the Enterprise when a decision was close with respect to the start-up of the project.

(3) It was further noted that default by a State Party with respect to its contributions to the fund for the first mine site of the Enterprise was a matter quite separate from a default with respect to the Authority's budget and deserved close attention, since the Enterprise would be wholly dependent on these contributions.

Article 29

Funds, assets and expenses

The funds, assets and expenses of the Enterprise shall be kept separate from those of the Authority. This provision shall not prevent the Enterprise from making arrangements with the Authority regarding facilities, personnel

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63/ Annex IV, article 11 (3).

64/ Annex IV, article 11 (3) (g). It should be noted that these currencies will have to be defined in the rules, regulations and procedures of the Authority in accordance with prevailing international monetary practice.

and services and arrangements for reimbursement of administrative expenses paid by either on behalf of the other. 65/

Article 30

Annual audit

The records, books and accounts of the Enterprise, including its annual financial statements, shall be audited annually by an independent auditor appointed by the Council. 66/

Section 11. SETTLEMENT OF DISPUTES

Article 31

Jurisdiction

The Seabed Disputes Chamber shall have jurisdiction in disputes with respect to activities in the Area between parties to a contract, being States Parties, the Authority or the Enterprise, State enterprises and natural or juridical persons referred to in article 153, paragraph 2 (b), of the Convention, concerning:

(a) the interpretation or application of a relevant contract or a plan of work, or

(b) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests. 67/

Article 32

Interpretation or application of a contract

1. Disputes concerning the interpretation or application of a contract referred to in article 31, subparagraph (a), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree. A commercial arbitral tribunal to which

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65/ Annex IV, article 11 (4).

66/ Annex IV, article 11 (5).

67/ Article 187 (c).

the dispute is submitted shall have no jurisdiction to decide any question of interpretation of the Convention. When the dispute also involves a question of the interpretation of Part XI and the Annexes relating thereto, of the Convention, with respect to activities in the Area, that question shall be referred to the Seabed Disputes Chamber for a ruling.

2. If, at the commencement of or in the course of such arbitration, the arbitral tribunal determines, either at the request of any party to the dispute or proprio motu, that its decision depends upon a ruling of the Seabed Disputes Chamber, the arbitral tribunal shall refer such question to the Seabed Disputes Chamber for such ruling. The arbitral tribunal shall then proceed to render its award in conformity with the ruling of the Seabed Disputes Chamber.

3. In the absence of a provision in the contract on the arbitration procedure to be applied in the dispute, the arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules, regulations and procedures of the Authority, unless the parties to the dispute otherwise agree. 68/

Section 12. LIABILITY

Article 33

Liability

The Enterprise shall not be liable for the acts or obligations of the Authority, nor shall the Authority be liable for the acts or obligations of the Enterprise. 69/

Article 34

Limitation of liability of the members of the Authority

Without prejudice to Annex IV, article 11, paragraph 3, of the Convention, no member of the Authority shall be liable by reason only of its membership for the acts or obligations of the Enterprise. 70/

68/ Article 188 (2).

69/ Annex IV, article 2.

70/ Annex IV, article 3.

Section 13. PRIVILEGES AND IMMUNITIES

Article 35

Position of Enterprise with regard to judicial process

Actions may be brought against the Enterprise only in a court of competent jurisdiction in the territory of a State Party in which the Enterprise:

(a) has an office or facility;

(b) has appointed an agent for the purpose of accepting service or notice of process;

(c) has entered into a contract for goods or services;

(d) has issued securities; or

(e) is otherwise engaged in commercial activity. 71/

Article 36

Immunity of the property and assets

1. The property and assets of the Enterprise, wherever located and by whomsoever held, shall be immune from all forms of seizure, attachment or execution before the delivery of final judgement against the Enterprise. 72/

2. The property and assets of the Enterprise, wherever located and by whomsoever held, shall be immune from requisition, confiscation, expropriation or any other form of seizure by executive or legislative action. 73/

71/ Annex IV, article 13 (3) (a).

72/ Annex IV, article 13 (3) (b).

73/ Annex IV, article 13 (4) (a).

Article 37

Exemption from restrictions, regulations, controls and moratoria

The property and assets of the Enterprise, wherever located and by whomsoever held, shall be free from discriminatory restrictions, regulations, controls and moratoria of any nature. 74/

Article 38

Respect for local laws and regulations

The Enterprise and its employees shall respect local laws and regulations in any State or territory in which the Enterprise or its employees may do business or otherwise act. 75/

Article 39

Rights, privileges and immunities

States Parties shall ensure that the Enterprise enjoys all rights, privileges and immunities accorded by them to entities conducting commercial activities in their territories. These rights, privileges and immunities shall be accorded to the Enterprise on no less favourable a basis than that on which they are accorded to entities engaged in similar commercial activities. If special privileges are provided by States Parties for developing States or their commercial entities, the Enterprise shall enjoy those privileges on a similarly preferential basis. 76/

Annotation

It was pointed out that rights, privileges and immunities were being discussed in informal plenary and that Special Commission 2 should wait on its decision on the Headquarters Agreement and see whether they fit the structure and organization of the Enterprise. It was pointed out that separate agreements were needed between the Enterprise and those State Parties within whose territory the Enterprise established sub-offices. It was noted that the Enterprise was a commercial entity and should be treated like other commercial entities under the most-favoured-nation clause. It was

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74/ Annex IV, article 13 (4) (b).

75/ Annex IV, article 13 (4) (c).

76/ Annex IV, article 13 (4) (d).

agreed that the question of whether the privileges and immunities of the Enterprise should be separated from those of the Authority would depend on what the host country decided.

Article 40

Special incentives, rights, privileges and immunities

States Parties may provide special incentives, rights, privileges and immunities to the Enterprise without the obligation to provide such incentives, rights, privileges and immunities to other commercial entities. 77/

Article 41

Tax status

The Enterprise shall negotiate with the host countries in which its offices and facilities are located for exemption from direct and indirect taxation. 78/

Article 42

Waiver

The Enterprise may waive any of the privileges and immunities conferred upon it under this section or in special agreements concluded by the Enterprise, to such extent and upon such conditions as it may determine. 79/

Section 14. PROCUREMENT

Article 43

Procurement

1. If the Enterprise does not possess the goods and services required for its operations it may procure them. For that purpose, it shall issue invitations to tender and award contracts to bidders offering the best combination of quality, price and delivery time.

77/ Annex IV, article 13 (4) (e).

78/ Annex IV, article 13 (5).

79/ Based upon Annex IV, article 13 (7).

2. If there is more than one bid offering such a combination, the contract shall be awarded in accordance with:

(a) the principle of non-discrimination on the basis of political or other considerations not relevant to the carrying out of operations with due diligence and efficiency; and

(b) guidelines approved by the Council with regard to the preferences to be accorded to goods and services originating in developing States, including the land-locked and geographically disadvantaged among them.

3. The Governing Board may adopt rules determining the special circumstances in which the requirement of invitations to bid may, in the best interests of the Enterprise, be dispensed with. 80/

80/ Annex IV, article 12 (3).